

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

DIMAS LOPEZ, et al.,)	
individually and on behalf of)	
a class of others similarly)	
situated,)	
)	
Plaintiffs,)	8:06CV459
)	
v.)	
)	
TYSON FOODS, INC.,)	MEMORANDUM AND ORDER
)	
Defendant.)	
_____)	

Plaintiffs, current and former production hourly employees of defendant's Lexington, Nebraska, meat processing facility, bring this action against defendant on behalf of themselves and others purported to be part of a class alleging violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., the Nebraska Wage and Hour Act ("Wage and Hour Act"), Neb. Rev. Stat. §§ 48-1201-1209, and the Nebraska Wage Payment and Collection Act ("NWPCA"), Neb. Rev. Stat. §§ 48-1228-1232. Specifically, plaintiffs claim defendant has failed to pay plaintiffs their minimum hourly rate of pay for all hours of work they performed in addition to overtime, as required by Nebraska and/or federal law. The uncompensated time includes, but is not limited to, time (before and after paid time, and during both breaks and meal periods) spent preparing, donning, doffing, and sanitizing sanitary and safety equipment and clothing, obtaining tools, equipment and supplies necessary for the performance of

plaintiffs' work, and all other activities in connection with these job functions (including related walking and waiting time).

This matter is before the Court on plaintiffs' motion for partial summary judgment (Filing No. [181](#)) and defendant's motion for summary judgment on plaintiffs' state law claims and partial summary judgment on plaintiffs' FLSA claims with respect to compensation for activities performed during the meal period (Filing No. [185](#)). Plaintiffs seek summary judgment on several of defendant's asserted defenses in this matter, claiming (1) defendant is not entitled to a defense asserting that some of the activities for which plaintiffs seek payment are noncompensable because these activities do not constitute "work" and/or these activities are not integral and indispensable to a principal activity under the Portal-to-Portal Act, 29 U.S.C. § 254 ; (2) defendant is not entitled to a "de minimis" defense excusing their non-compliance with the FLSA; and (3) defendant is not entitled to a defense alleging it did not "willfully" deprive plaintiffs of any wages or any "good faith" defense or "good faith" reduction in liquidated damages. Defendant, in turn, asserts plaintiffs' claim brought pursuant to the FLSA for compensation for activities plaintiffs perform during their meal period should be dismissed because plaintiffs receive the predominate benefit of their meal period and/or because these activities are "de minimis." Defendant also claims plaintiffs'

two state law claims should be dismissed because plaintiffs' own evidence is insufficient to support a violation of either law.

I. BACKGROUND AND PROCEDURAL HISTORY

Defendant Tyson Foods, Inc. (hereinafter "Tyson" or "defendant") is a Delaware corporation that operates numerous beef and chicken processing facilities located throughout the United States, including a beef processing facility in Lexington, Nebraska. The Lexington, Nebraska, beef slaughter and processing facility is operated by Tyson's wholly-owned subsidiary, Tyson Fresh Meats, Inc. Tyson's Lexington, Nebraska, facility presently employs approximately 2300-2400 hourly production employees. Plaintiffs are current and former hourly production employees at the Lexington facility, and they work or worked in one of the two main production departments at the Lexington facility, namely the Slaughter department or the Fabrication department.

Tyson's hourly production employees cannot enter the Slaughter department or the Fabrication department unless they are wearing certain clothing or gear. All production employees, regardless of department, are required to wear a hard hat, safety glasses or some form of eye protection, earplugs, and a hairnet. Production employees in the Slaughter department are also required to wear company-issued pants and shirt. Production employees in the Fabrication department are also required to wear

a company-issued frock. If employees in the Fabrication department are required to handle meat products with their hands, they must also wear cotton gloves on each hand. Employees who utilize knives in connection with their specific positions are required to wear additional "unique" or "specialized" clothing and gear. In addition, some employees choose to wear or utilize certain clothing or gear not required for their positions.

Tyson pays the majority of its Lexington hourly production employees in the Slaughter and Fabrication departments on a "gang time" basis. Gang time represents the time that plaintiffs are physically at the assembly line while the production lines are moving and producing product. Gang time is approximately eight hours per shift.¹ Production employees get two breaks during a typical eight-hour shift: one for a meal period and one for a rest break.² During these breaks, production employees are free to leave the production areas.

Beyond gang time, Tyson pays additional minutes to certain employees coded separately in Tyson's payroll under a "K

¹ Although plaintiffs punch in at one of Tyson's seven time clocks as they enter the Slaughter or Fabrication departments at the Lexington facility, Tyson typically uses these time clocks only to record attendance, not actual hours worked. The time clocks, however, are used for pay purposes if employees arrive after the start of paid time for their line.

² Prior to March 2010, the rest break was a paid 15-minute break, and the meal period was an entirely unpaid 30-minute break.

code." K code time refers to the minutes intended to pay plaintiffs for certain donning, doffing, washing, walking, waiting, and related activities they perform before and after the shift and during breaks. As Tyson does not keep track of the "actual" time plaintiffs spend on such activities, K code time represents an average time spent on such activities. Furthermore, Tyson has routinely changed the amount of K code time paid to Lexington employees and the eligibility requirements for K code time in response to longtime, ongoing litigation initiated by the Department of Labor against Tyson's predecessor, Iowa Beef Processors, Inc. ("IBP").

In 1988, the Secretary of Labor brought an action against IBP and all of its non-union facilities for pre- and post-shift time spent on clothing issues. After twelve years and four published opinions, and a negotiated settlement, the case resulted in a permanent and nationwide injunction, dictating that pre- and post-shift activities related to donning and doffing unique or specialized protective clothing and gear worn by knife-wielding employees must be compensated by IBP. *Reich v. IBP, Inc.*, No. 88-2171-EEO, 1996 WL 445072 (D. Kan. July 30, 1996), *aff'd*, *Metzler v. IBP, Inc.*, 127 F.3d 959 (10th Cir. 1997). As a consequence of these cases and a settlement in *Herman v. IBP, Inc.*, No. 98-CV-2163-JWL (D. Kan. April 10, 1998), knife-wielding employees received pay for an extra four minutes per shift in

addition to gang time from IBP. The four minutes was calculated based on a time study performed by IBP and became what is known as K code time.

Years later, "[a]fter the Supreme Court's decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), in which the [Supreme Court] held that walking time is compensable if it follows or precedes a principal working activity, Tyson conducted a time study to determine the number of minutes required for certain pre- and post-shift walking time within [its] facilities." *Garcia v. Tyson Foods, Inc.*, No. 2:06-CV-02198, 2001 U.S. Dist. LEXIS 10290, at *32 (D. Kan. January 31, 2011). As a result, Tyson³ again modified its K code policy. From January 29, 2007, to March 28, 2010, Tyson paid knife-wielding plaintiffs working at the Lexington plant -- based upon the amount of equipment they wore in the job they performed -- between four and seven minutes per day in addition to gang time. Tyson intended these four to seven minutes to compensate employees for certain donning, doffing, washing, walking, waiting and related activities they performed before and after the shift. The number of minutes was calculated based on the original four-minute time study performed by IBP in 1998, plus a walking time study performed by Tyson in 2006. Some class members, however, were not paid for any minutes in addition to gang time between January 29, 2007, and March 28,

³ IBP became Tyson in 2003.

2010, because they were non-knife-wielding employees who wore minimal equipment for their jobs.

In response to this lawsuit in Nebraska and other wage and hour lawsuits filed nationwide against Tyson, Tyson implemented a new K code policy once again. As of March 29, 2010, Tyson has paid all plaintiffs working at the Lexington plant at least 20 minutes in addition to gang time. Tyson intends these 20 minutes to compensate employees for certain donning, doffing, washing, walking, waiting, and related activities they perform before and after the shift and during each of their two breaks.⁴ Some employees are also paid one to six additional minutes on top of the 20 minutes based on the amount of equipment they wear for their job. The number of minutes now paid is based, in part, on the original four-minute time study performed by IBP and the walking time study performed by Tyson.

Here, plaintiffs seek compensation for any unpaid, "actual" time (before and after paid time, and during both breaks and meal periods) spent preparing, donning, doffing, and sanitizing sanitary and safety equipment and clothing, obtaining tools, equipment and supplies necessary for the performance of

⁴ Currently, the first break is 25 minutes, five minutes of which is paid and 20 minutes of which is unpaid. The second break is 35 minutes, five minutes of which is paid and 30 minutes of which is unpaid and utilized as a meal period.

their work, and all other activities in connection with these job functions for which Tyson does not already compensate them.⁵

II. STANDARD OF REVIEW

Summary judgment is appropriate when, viewing the facts and inferences in the light most favorable to the nonmoving party, "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322(1986). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those

⁵ The trial court in the *Reich* litigation also held that the donning and doffing of standard (non-unique) clothing and gear worn by all production employees was not compensable, and the Tenth Circuit affirmed the court's holding. See *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994). Here, plaintiffs seek compensation for the donning and doffing of both "standard" and "unique" clothing and gear. In defendant's previous motion for summary judgment (Filing No. [29](#)), this Court noted the Supreme Court's decision in *Alvarez* has arguably changed the legal test on these issues such that plaintiffs' claims related to standard protective clothing and gear are no longer barred by *Reich*. See Mem. and Order dated Mar. 20, 2007, slip op. at 6 (Filing No. [56](#)).

portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. If the moving party meets the initial burden, the burden then shifts to the opposing party to produce evidence of the existence of a genuine issue for trial. *Id.* at 324.

"The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A "genuine" issue of material fact exists "when there is sufficient evidence favoring the party opposing the motion for a jury to return a verdict for that party." *Id.* at 249-52 (noting the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law). If "reasonable minds could differ as to the import of the evidence," summary judgment should not be granted. *Id.* at 250-51.

The evidence must be viewed in the light most favorable to the nonmoving party, giving the nonmoving party the benefit of all reasonable inferences. *Kenney v. Swift Transp., Inc.*, 347

F.3d 1041, 1044 (8th Cir. 2003). "In ruling on a motion for summary judgment, a court must not weigh evidence or make credibility determinations." *Id.* "Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." *Koehn v. Indian Hills Cmty. Coll.*, 371 F.3d 394, 396 (8th Cir. 2004).

III. DISCUSSION

This Court will first address plaintiffs' partial motion for summary judgment on defendant's affirmative defense. It will then consider defendant's partial motion for summary judgment on plaintiffs' meal period claims, as well as defendant's motion for summary judgment on plaintiffs' state law claims.

A. Defendant's Affirmative Defense Nos. 11 and 13

Plaintiffs ask this Court to deny defendant the ability to bring affirmative defenses alleging that the donning and doffing of standard (non-unique) clothing or gear⁶ is noncompensable either because it is not "work" or because it is

⁶ Throughout their briefing, plaintiffs mention various "unique" items, such as mesh or Kevlar sleeves, mesh gloves, cut-resistant (Kevlar) gloves, hard plastic arm guards, mesh aprons, back mesh, scabbards, and steel. Defendant does not dispute as to the compensability of these items because they are subject to the *Reich* injunction and defendant has been paying for the donning and doffing of these items. The only issues remaining for these items involve whether plaintiffs have been/are or should be compensated for the "actual" time they spend completing such activities.

considered noncompensable under the Portal-to-Portal Act, 29 U.S.C. § 254. See defendant's affirmative defense Nos. 11 § 13 (Filing No. [19](#)). During the *Reich* litigation, the trial court held that the donning and doffing of standard (non-unique) protective clothing and gear worn by production employees was noncompensable. The Tenth Circuit affirmed the court on this issue, holding that the donning and doffing of standard (non-unique) clothing and gear cannot constitute "work" under the FLSA because these tasks require little exertion, concentration and/or effort pursuant to the Supreme Court's decision in *Tennessee Coal v. Muscoda Local No. 123*, 321 U.S. 590 (1944). See *Reich v. IBP, Inc.*, 38 F.3d 1123, 1125 (10th Cir. 1994). Defendant acknowledges that this Court expressed the view that the Supreme Court's test in *Alvarez* deviated from the *Reich* and *Tennessee Coal* analysis. See Mem. and Order dated Mar. 20, 2007, slip op. at 6 (Filing No. [56](#)), and the Court reaffirms its previous holding. In *Alvarez*, the Supreme Court provided "that 'exertion' was not a fact necessary for an activity to constitute 'work' under the FLSA," 546 U.S. at 25. Thus, defendant will be denied the ability to bring an affirmative defense alleging that the donning and doffing of standard (non-unique) clothing or gear is noncompensable because it is not "work" pursuant to the *Reich* and *Tennessee Coal* analysis. This Court's decision on this issue is of little significance however, because, as defendant has argued,

there remains an issue of material fact as to whether the donning and doffing of standard (non-unique) clothing or gear is compensable under the Portal-to-Portal Act, 29 U.S.C. § 254.

The Supreme Court further provided in the *Alvarez* decision that any activity that is integral and indispensable to a principal activity is itself a principal activity, and therefore, compensable under the FLSA. 546 U.S. at 37. In analyzing whether the donning and doffing of standard (non-unique) clothing and gear is an activity which is integral and indispensable to a principal activity, district courts have adopted a three-part test which this Court incorporates here. This Court must analyze: "(1) whether the activity is required by the employer, (2) whether the activity is necessary for the employee to perform his or her duties, and (3) whether the activity primarily benefits the employer." See *In re Tyson Foods, Inc., Fair Labor Standards act Litig.*, 694 F. Supp. 2d 1358, 1363 (M.D. Ga. 2010). See also *Garcia*, No. 2:06-CV-02198, 2001 U.S. Dist. LEXIS 10290 *28-29 (applying the same test); *Chao v. Tyson Foods*, 568 F. Supp. 2d 1300, 1311 (N.D. Ala. 2008) (same). In applying this three-part test to undisputed facts, some district courts have determined as a matter of law that the donning and doffing of certain gear is integral and indispensable to a principal activity at the summary judgment stage. See *Hoyt v. Ellsworth Co-op. Creamery*, 579 F. Supp 2d 1132, 1140-41 (W.D.

Wis. 2008); *Jordan v. IBP, Inc.* 542 F. Supp. 2d 790, 807 (M.D. Tenn. 2008); *Spoerle v. Kraft Foods Global, Inc.*, 527 F. Supp. 2d 860, 864 (W.D. Wis. 2007). No such undisputed facts, however, exist here.

In arguing this issue, plaintiffs did not address the three-part test specifically, and instead asserted that donning and doffing standard clothing and gear is integral and indispensable because, among other relevant facts, it is undisputed that production employees at the Lexington facility must obtain and don most or all of their clothing and gear on site at the plant prior to entering the production floor and performing any meat processing activities. Plaintiffs have not provided this Court with an analysis showing that plaintiffs must wear standard equipment and gear at the Lexington facility in order to primarily benefit Tyson, rather than the plaintiffs themselves as required by the three-part test. In response, Tyson has presented this Court with enough evidence to raise an issue of material fact as to whether the mandatory standard clothing and gear benefits the plaintiffs as much as Tyson. As Tyson points out, employees benefit from the standard clothing and gear because they are able to stay clean, warm, and safe while working on the production floor.⁷ A question of material

⁷ Tyson asserts that OSHA, 20 U.S.C. §§ 651-78 requires Tyson to furnish employees "a place of employment which [is] free from recognized hazards that are causing or are more likely to

fact remains as to whether the donning and doffing of standard (non-unique) clothing or gear is integral and indispensable to a principal activity making it compensable under the Portal-to-Portal Act, 29 U.S.C. § 254 .

Thus, plaintiffs' motion for partial summary judgment as to defendant's affirmative defense No. 11 will be granted, and plaintiffs' motion for partial summary judgment as to defendant's affirmative defense No. 13 will be denied.

B. Defendant's Affirmative Defense No. 12

Plaintiffs further ask this Court to deny defendant the ability to bring its asserted "de minimis" defense. See defendant's affirmative defense No. 12 (Filing No. [19](#)). As plaintiffs agree, the Supreme Court has previously recognized that employers do not need to pay employees for otherwise compensable time if that time is "de minimis." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) ("When the matter at issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded.") As the parties acknowledge in their briefing, courts have weighed three factors in determining whether a claim is too small for

cause death or serious physical harm to [their] employees," and to "comply with occupational safety and health standards promulgated under this [Act]." *Id.* at § 654. In turn, Tyson provides that the regulations require employers to mandate the use of "personal protective equipment for eyes, face, head, and extremities [and] protective clothing . . ." C.F.R. § 1910.132(a).

recovery and thus de minimis: (1) the practical administrative difficulty in recording the time, (2) the size of the aggregate claim, and (3) the regularity of the additional work. *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984).

The fact that this Court has denied plaintiffs' motion on defendant's affirmative defense concerning the integral and indispensable issues "reflects that the amount of daily time spent on additional 'work' is simply not an issue that can readily be ascertained at summary judgment in the particular context of this case." *Garcia*, No. 2:06-cv-02198, 2001 U.S. Dist. LEXIS 10290 at *52. As the parties dispute what activities constitute compensable activities in the first place, issues of material fact exist concerning the amount of time such activities take. See *Chao*, 568 F. Supp. 2d. at 1318-19 & n.19 (denying plaintiff's motion for summary judgment on defendant's de minimis defense where factual issues remained as to the length of time of the activities at issue).

Thus, the Court will not preclude defendant from asserting a de minimis defense at trial. Plaintiffs' motion for partial summary judgment as to defendant's affirmative defense no. 12 will be denied.

C. Defendant's Affirmative Defense Nos. 6, 7, & 8

Plaintiffs seek partial summary judgment on defendant's good faith defense that Tyson acted in good faith pursuant to 29

U.S.C. § 259, in conformity with the DOL regulations and interpretations of the FLSA. See defendant's affirmative defense No. 8, (Filing No. [19](#)). Defendant has abandoned this defense. See defendant's brief in opposition to motion for summary judgment (partial), at 49 (Filing No. [192](#)). Thus, plaintiffs' motion for partial summary judgment as to defendant's affirmative defense No. 8 will be granted.

Plaintiffs also seek partial summary judgment on defendant's affirmative defense that defendant acted in good faith pursuant to 29 U.S.C. § 260 and therefore should not be penalized with liquidated damages. See defendant's affirmative defense No. 7, (Filing No. [19](#)). Finally, plaintiffs seek partial summary judgment on defendant's affirmative defense that defendant did not "willfully deprive any person of any wages to which they may have been entitled" pursuant to 25 U.S.C. § 255(a), and therefore the limitations period in this case cannot be shortened from three years to two. See defendant's affirmative defense No. 6 (Filing No. [19](#)).

If an employer violates the FLSA, then such employer is liable for both the total amount of unpaid wages and liquidated damages of an equal amount. 29 U.S.C. § 216(b). An employer can avoid liquidated damages, if he shows "to the satisfaction of the court that the act or omission giving rise to such action was in

good faith and that he had reasonable grounds for believing his act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260. Section 260 has both subjective and objective components, thus, defendant must establish that it acted with good faith and reasonableness. *Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 941 (8th Cir. 2008). "The 'good faith' requirement is a subjective standard where the employer must establish 'an honest intention to ascertain and follow the dictates of the FLSA.'" *Id.* (quoting *Hultgren v. County of Lancaster, Neb.*, 913 F.2d 498, 509 (8th Cir. 1990)). "To carry his burden, a defendant employer must show that he took affirmative steps to ascertain the Act's requirements, but nonetheless, violated its provisions." *Id.* "Precise conformity" with the FLSA and its accompanying regulations and DOL interpretations is not necessary; a "reasonable belief of conformity" is all that is required. *Chao*, 568 F. Supp. 2d at 1322. Even where an employer's decisions about the FLSA are incorrect, liquidated damages are not proper if the employer made a good faith attempt to comply with the FLSA. *Cross v. Arkansas Forestry Comm'n*, 938 F.2d 912, 918 (8th Cir. 1999); *Hultgren*, 913 F.2d at 509-10.

Except where an employer acts willfully, which extends the limitations period to three years, a two-year statute of limitations applies to an action for unpaid wages under the FLSA. 29 U.S.C. § 255(a). Plaintiffs bear the burden of proof on the

willfulness issue in order to make out their prima facie case for damages in the third year. See *Nolting v. Yellow Freight Sys., Inc.*, 799 F.2d 1192, 1197 (8th Cir. 1986). For purposes of § 255(a), willful means "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by [the FLSA]." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988).

In this lawsuit, plaintiffs seek damages for unpaid wages for time spent donning and doffing both (1) unique and (2) standard equipment and gear. In addressing the good faith and willfulness issues, plaintiffs primarily analyze defendant's conduct as to its non-payment for time spent donning and doffing standard equipment and gear. Citing the Supreme Court's 2005 ruling in *Alvarez*, plaintiffs proclaim defendant made little if any attempt to change the way it paid its employees for donning and doffing standard gear prior to 2010. The *Alvarez* decision, however, did not mandate that defendant begin compensating plaintiffs for time spent donning and doffing standard gear. All *Alvarez* did was change the test utilized to analyze whether an employer must pay an employee for such activities. Thus, a strong argument can be made that defendant has acted in good faith in refraining from paying plaintiffs for time spent donning and doffing standard clothing and gear, and defendant has not wilfully deprived plaintiffs of any wage related to standard

gear. *Garcia*, No. 2:06-cv-02198, 2001 U.S. Dist. LEXIS 10290 at *67-68. Furthermore, plaintiffs have not provided this Court with sufficient evidence that shows defendant has not satisfactorily complied, under the good faith/willfulness standards, with the *Reich* injunction in paying plaintiffs for the average time spent donning and doffing unique gear; or if as a matter of law defendant must compensate plaintiff for "actual" time spent on such activities.

Thus, this Court concludes (1) it is possible that defendant has acted in good faith in refraining from paying plaintiffs for time spent donning and doffing standard clothing and gear and related activities, and also possible defendant has not willfully deprived plaintiffs of wages they may be entitled to for donning and doffing standard clothing and gear; and (2) a question of material fact remains as to whether defendant acted in good faith in compensating plaintiffs for the average time spent donning and doffing unique clothing and gear and related activities, and whether defendant willfully deprived plaintiffs of wages they may be entitled to for "actual" time spent donning and doffing unique clothing and gear. See *Garcia*, No. 2:06-cv-02198, 2001 U.S. Dist. LEXIS 10290 at *67-73 (making similar findings on the same issue). The Court will not preclude defendant from asserting any good faith or willfulness defense at

this time. Plaintiffs' motion for partial summary judgment as to defendant's affirmative defense nos. 6 & 7 will be denied.⁸

D. Plaintiff's Meal Period Activities

Defendant has moved for partial summary judgment on plaintiffs' claims under the FLSA seeking compensation for donning, doffing, washing and other activities that take place during their meal period. From the beginning of the class period until March 29, 2010, plaintiffs working at the Lexington plant received a 30-minute unpaid meal period everyday. As of March 29, 2010, plaintiffs working at the Lexington plant received a 35-minute meal period, five minutes of which is paid and 30 minutes of which is unpaid. Defendant claims because the meal period is a "bona fide meal period" plaintiffs are not entitled to compensation for any part of the meal period. The DOL has issued a regulation addressing "bona fide meal periods":

Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purpose of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide

⁸ There is a dispute as to whether plaintiffs properly put the issue of whether defendant should be allowed to bring a good faith defense regarding plaintiffs' state law claims before the Court. Pursuant to this Court's ruling on the good faith/willfulness issues surrounding plaintiffs' federal claims, the Court will allow defendant to bring a good faith defense as to plaintiffs' state law claims as well.

meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.

29 C.F.R. § 785.19(a). The Eighth Circuit has joined the majority of the circuit courts in adopting the "predominantly-for-the-employer's benefit standard" in determining whether a meal period is bona fide under the FLSA. *Henson v. Pulaski Co. Sheriff Dept.*, 6 F.3d 531, 534 (8th Cir. 1993). Under the predominant benefit analysis, an employee's meal period is bona fide and thus considered noncompensable when the employee's time is not spent predominantly for the benefit of the employer. Indeed, even if an employee is required to do some amount of work during a meal period, that entire meal period may be noncompensable. *Garcia*, No. 2:06-cv-02198, 2001 U.S. Dist. LEXIS 10290 at *58 (citing *Lamon v. City of Shawnee, Kansas*, 972 F.2d 1145, 1156-67 (10th Cir. 1002)). Defendant asserts there is no genuine factual dispute that plaintiffs spend the meal period as a whole predominantly for their own benefit such that time spent donning, doffing, and on related activities is noncompensable pursuant to the Eighth Circuit's ruling on the DOL regulation. In the alternative, defendant moves for partial summary judgment

on plaintiffs' meal period claim because the donning and doffing activities performed during the meal period are de minimis.

Although the parties agree (pursuant to plaintiffs' expert's opinion) that plaintiffs in the Fabrication side of the plant spend an average of 6.45 minutes on donning and doffing activities during the meal period and plaintiffs in the Slaughter side of the plant spend an average of 3.66 minutes on donning and doffing activities during the meal period, the Court cannot determine as a matter of law whether plaintiffs' time is or is not spent predominantly for the benefit of the employer. The parties agree that during the meal period, before entering the cafeteria, plaintiffs are required to remove all knives, scabbards and smocks. The parties, however, have not presented any evidence showing that, if items are required by defendant to be removed during the meal period, whether such is required predominantly for the defendant's benefit or the plaintiffs'. Moreover, it is not clear how much of the 6.45 minutes and 3.66 minutes plaintiffs spend donning and doffing the required items versus the non-required items. To complicate issues more, the parties agree that plaintiffs are required to remove almost all of their equipment before using the restroom, but once again the parties have not shown the Court that this is a requirement that

predominantly benefits defendant, or if it benefits plaintiffs.⁹ Thus, material issues of fact remain as to whether the activities performed during the meal period predominantly benefit the defendant or plaintiffs and how much time is spent on such activities in light of the evidence surrounding the requirements of plaintiffs' restroom use. See *Garcia*, No. 2:06-cv-02198, 2001 U.S. Dist. LEXIS 10290 at *59-60 (denying summary judgment on meal period claim due to similar issues of material fact); *Jordan*, 542 F. Supp.2d at 814-15 (same). Defendant's motion for partial summary judgment as to plaintiffs' meal period claims will be denied.

E. Plaintiffs' state law claims

Plaintiffs bring claims for unpaid wages pursuant to the Nebraska's Wage and Hour Act ("Wage and Hour Act"), Neb. Rev. Stat. §§ 48-1201 to 1209. The Wage and Hour Act provides a minimum hourly wage (\$5.15 through July 23, 2007; \$5.85 from July 24, 2007, through July 23, 2008; \$6.55 from July 24, 2008, through July 23, 2009; and \$7.25 after July 24, 2009). The minimum wage rates in Nebraska are identical to those set by the FLSA. The Wage and Hour Act provides that an employer who violates the minimum wage provision "shall be liable to the

⁹ Although the parties did not address this issue, it is likely plaintiffs use the restroom during their meal period.

employees affected in the amount of their unpaid minimum wages.” Neb. Rev. Stat. § 48-1206. Thus, the Wage and Hour Act does not provide plaintiffs with any substantive rights to wages. Only if it is found that plaintiffs have a right to unpaid wages under the FLSA (or any other law providing a substantive right to wages), and defendant fails to compensate plaintiffs for such wages, do plaintiffs have a claim pursuant to the Wage and Hour Act to recover wages. See *Garcia*, No. 2:06-cv-02198, 2001 U.S. Dist. LEXIS 10290 at *75-76 (citing *Bouaphakeo v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870, 883 (N.D. Iowa 2008) (if a plaintiff has a right to wages pursuant to the FLSA, a state wage payment act serves as a platform to collect such unpaid wages)).

The parties have engaged in a complicated debate as to whether the Court should apply the *Klinghoffer* rule in its analysis of plaintiffs’ claims under the Wage and Hour Act. The Eighth Circuit has applied the *Klinghoffer* rule to the FLSA’s minimum wage provision, 29 U.S.C. § 206(a):

A violation of section 206(a) occurs when an employee is paid at a rate that is below the minimum rate. The statute requires the payment of a minimum wage to “employees who in any workweek [are] engaged in commerce,” 29 U.S.C. § 206(a) and set the minimum wage in terms of an hourly rate. However no violation occurs “so long as the total weekly wage paid by an employer meets the minimum weekly requirements of the statute, such minimum weekly requirements

being equal to the number of hours
actually worked that week
multiplied by the minimum hourly
statutory requirement."

Hensley v. MacMillan Bloedel Containers, Inc., 786 F.2d 353, 357
(8th Cir. 1986) (quoting *United States v. Klinghoffer Bros.
Realty Corp.*, 285 F.2d 487, 490 (2d Cir. 1960)). No court in
Nebraska has applied the federal *Klinghoffer* rule to the state
Wage and Hour Act. Regardless, defendant claims the rule should
be applied, and even if plaintiffs can prove all of the
activities for which they seek compensation are compensable,
their "adjusted" hourly wage rates pursuant to the *Klinghoffer*
rule will be above the required state minimum wage rates, and
thus plaintiffs' Wage and Hour Act claims should be dismissed.

In light of the fact that material factual disputes
remain as to whether plaintiffs have any right to wages pursuant
to the FLSA, a ruling concerning the *Klinghoffer* rule's
application to "hypothetical" wages claimed pursuant to the Wage
and Hour Act would be premature. If it is found at trial that
plaintiffs have a right to wages under the FLSA, and a
Klinghoffer calculation would affect plaintiffs' claims under the
Wage and Hour Act, defendant will be permitted to present an
argument that the *Klinghoffer* calculation should apply. For the
time being, defendant's arguments are duly noted by the Court,
but defendant's motion for summary judgment on plaintiffs' Wage
and Hour Act claim will be denied.

Plaintiffs also bring claims for compensation under the Nebraska Wage Payment and Collection Act ("NWPCA"), Nev. Rev. Stat. §§ 48-1228 to 48-1232. The NWPCA allows an employee to bring a claim for unpaid wages, Neb. Rev. Stat. § 48-1231, and defines "wages" as:

compensation for labor or services rendered by an employee, including fringe benefits, *when previously agreed to and conditions stipulated have been met by the employee*, whether the amount is determined on a time, task, fee, commission, or other basis.

Neb. Rev. Stat. § 48-1229 (emphasis added). Like the Wage and Hour Act, the NWPCA provides no substantive right to wages, it merely provides a means for collecting unpaid wages. *Garcia*, No. 2:06-cv-02198, 2001 U.S. Dist. LEXIS 10290 at *75-76 (citing *Bouaphakeo*, 564 F. Supp. at 883.

Defendant claims plaintiffs cannot prove that they are owed the compensation they seek because (1) they cannot determine that the alleged "wages" owed were previously agreed to by defendant; and (2) they cannot demonstrate that they have met any conditions that were stipulated to.¹⁰ The Court rejects both of defendant's argument. Plaintiffs are/were hourly production

¹⁰ Defendant cites *Freeman v. Central States Health & Life Co.*, 2 Nep. App. 803, 807, 515 N.W.2d 131, 134-35 (1994) and *In Re: Wal-Mart Wage and Hour Employment Practices Litigation and All Related Cases*, 490 F. Supp. 2d 1091 (D. Nev. 2007), such authority is distinguishable, and thus not entitled to legal force.

employees of the defendant. If it is found that plaintiffs have worked hours that they have not been paid for, they may use the NWPCA as a mechanism for collecting those wages. Thus, defendant's motion for summary judgment on plaintiffs' NWPCA claim will be denied. Accordingly,

IT IS ORDERED:

1) Plaintiffs' motion for partial summary judgment (Filing No. [181](#)) as to defendant's affirmative defense Nos. 8 and 11 is granted.

2) Plaintiffs' motion for partial summary judgment (Filing No. [181](#)) as to defendant's affirmative defense Nos. 6, 7, 12 and 13 is denied.

3) Defendant's partial summary judgment on plaintiffs' FLSA claims with respect to compensation for activities performed during the meal period (Filing No. [185](#)) is denied.

4) Defendant's motion for summary judgment on plaintiffs' state law claims (Filing No. [185](#)) is denied.

DATED this 6th day of April, 2011.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court